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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 383

G. D. SWINSON,

Petitioner,

vs.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY,

Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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OPINION DELIVERED IN COURT BELOW.

G. D. Swinson vs. Chicago, St. Paul, Minneapolis and Omaha Railway Company, ... Federal (2d), Page ...., C. C. A. 8. Opinion filed August 1, 1934, but not yet officially reported (R. 122 to 129).

FOREWORD.

Petitioner's brief does not contain a statement of the case, as required by this court's Rule 27 (d), (former Rule 25 (d)), and his Summary of Facts, so-called, on Pages 3 and 4 of the

Petition is inconclusive and inaccurate. For these reasons we deem it advisable to make a concise statement of the case. Before doing so, however, we desire to direct the Court's attention to, and to correct, the following statements in the Petition, regarding the theory of the trial and lower appellate courts' decision and respondent's claims therein:

> "1st: That the only question involved in this case is whether a railway employe can recover if he is injured because of the giving way of a grabiron at the end of a railway tank car when plaintiff had his foot thereon, the railroad company admitting that there would be liability if he had his hand on the grabiron, but claiming there would be none when he had his foot thereon." (Petition, p. 1).
>
> "The railroad company, respondent, claimed that because petitioner put his *foot* on the grabiron instead of his *hand*, that he could not recover, and that he was not 'within the *class*' for whose benefit the statute was enacted, although he was a *railway brakeman*."
>
> "The Circuit Court of Appeals of the Eighth Circuit upheld the trial court on the theory that petitioner could not recover because he put his *foot* on the instrumentality, although he could have recovered had it given way when he had his *hand* thereon." (Petition, p. 4).

These statements are wholly misleading and neither correctly state respondent's claim in the courts below nor the theory on which the trial court directed a verdict and the Circuit Court of Appeals affirmed the judgment entered thereon.

Petitioner was injured while exerting pressure with his right foot on an end handhold to secure leverage in releasing a tight brake on an oil tank car, the foot pressure so exerted on the handhold causing it to pull away from, and split the end running board to which it was affixed (R. 5, 6, 7). This end handhold was no part of any ladder or step leading from

near the ground to the running board and petitioner was utilizing the handhold solely as a foot brace upon which to exert pressure to secure leverage in releasing the brake and not as a ladder rung or step to stand on in riding or climbing on the car (R. 123, Lines 17, 18, 19, 33, 34, 35).

The claim of respondent and the theory of the courts below can best be indicated by the following from the opinion of the Circuit Court of Appeals:

> "It is contended, however, that since Swinson was using this handhold as a foot hold, foot rest or foot brace, the defendant owed him no duty to furnish him a handhold sufficient for that purpose or any handhold at all, and that he was in no better position in using a defective handhold for a foot hold than he would have been in had there been no handhold and had he been injured in groping for a non-existent handhold with his right foot." (R. 124, first paragraph).
>
> "* * * * where an appliance is used or relied upon for a purpose and function not intended, and its failure causes injury, it cannot be said to be the proximate cause of the injury, because the injury is not the natural, probable and foreseeable consequence of the failure to comply with the law. So in this case, while the giving way of the handhold resulted in Swinson's injuries, the failure of the defendant to comply with the provisions of the law cannot be said to be the proximate cause of those injuries which resulted from the unexpected and unintended use which was made of the handhold, nor was Swinson, under the circumstances, one of the class for whose benefit the law was enacted or to whom the duty of complying with it was owed, since his injuries were not 'within the evil against which the provisions for such appliances are directed.'" (R. 128 bottom, 129 top).

It will be seen that it is not a question of whether Swinson had his hand on the handhold or his foot, but whether, while

using the handhold for a purpose for which it was not intended or required by the Safety Appliance Acts he is entitled to recover as for a violation thereof.

STATEMENT OF THE CASE.

Petitioner brought this action in the United States District Court, District of Minnesota, Fourth Division, under the Federal Employers' Liability Act, (Act of April 22, 1908, C. 149, 35 Stat. 65, 45 U. S. C. Sec. 51), to recover for personal injuries alleged to have resulted from respondent's violation of the Safety Appliance Acts relating to handholds (Act of Mar. 2, 1893, C. 196, Sec. 4, 27 Stat. 531; 45 U. S. C. Sec. 4) and running boards (Act of Apr. 14, 1910, C. 160, Sec. 2, 36 Stat. 298, 45 U. S. C. Sec. 11). Respondent denied liability. At the close of the evidence the trial court directed a verdict for respondent (R. 67), upon which judgment was entered (R. 113) and the Circuit Court of Appeals for the Eighth Circuit, on August 2, 1934, affirmed this judgment (R. 129).

Petitioner, a railway freight brakeman, was injured at Mitchell, South Dakota, September 17, 1932, while releasing the handbrake at the west end of an oil tank car (R. 71, 73), then moving slowly westward, when one end of the horizontal handhold affixed at the North side of the west end of the running board at the west end of the car pulled away from, and split the running board (R. 5, 6, 7). Exhibits 8 and 9 are photographs of the west end of the car and Exhibit 8 shows the handhold immediately after the accident (R. 71, 73).

The tank car was equipped with end and side running boards that extended around the car. The running board at the west end of the car was 11 inches wide (east to west), 9 feet long (north to south), and the handhold was 18 inches long and at

each end was bolted to the under side of the board, extended horizontally or outward from the west edge of the running board 2¾ inches and was 1¾ inches, or the thickness of the board, below the upper surface thereof. The brake staff was in the middle (east to west) of the end running board and 34 inches from the board's north edge (R. 17, 18, 21, 22).

The brake was tightly set and to release it required the application of considerable force to the brake wheel. To exert such force petitioner placed his left foot on the surface of the running board back of the brake pawl and his right foot down on to this handhold and as he pulled on the brake wheel and exerted foot pressure downward and outward on the handhold its north end pulled through and split the running board, overbalancing petitioner and causing him to fall to his injury (R. 5, 6, 7).

The Interstate Commerce Commission's Safety Appliance Standards Order of March 13, 1911, required that the end running board have a minimum width of 6 inches and permitted the end handholds to be affixed to the end of the end running board, extending either horizontally outward or vertically downward (R. 22, 23; Roberts' Federal Liability of Carriers (2nd Ed.), Vol. 2, P. 2028 top). On 90% of the tank cars in use at the time, the handholds at the end of the end running boards extended downward, either out from the running board, as shown on Exhibits 14 and 15 (R. 83, 85), or back under the running board as shown on Exhibits 13, 16, 19, 21 and 24, (R. 81, 87, 91, 95, 101), or had some obstacle between the handhold and the brake, as shown on Exhibits 13, 14, 15, 20, 22, 24, 25, (R. 81, 83, 85, 93, 97, 101, 103, 123 bottom), making it impossible to reach with the foot while standing on the running board at the brake (R. 29, 30, 34 to 47 incl.). Each tank car of the type involved has a similar handhold affixed to the end

running board in the same manner at each side of each end of the car (R. 23).

FOREWORD.

The difficulty of treating the question at issue in an orderly and concise manner is enhanced by petitioner's failure in his brief to comply with the rules of this court respecting assignments of error (Rule 27 (e), former Rule 25 (e)), and summary of points relied on in the argument (Rule 27 (f), former Rule 25 (f)).

In his complaint petitioner alleged a violation of the Safety Appliance Acts relating to running boards and in his petition herein refers to that allegation and quotes a portion of the statute (Petition, P. 2), but nowhere else in his petition and brief does he argue this point and the Circuit Court of Appeals in its opinion states that the alleged violation of the Act relating to running boards was not urged in that court (R. 125 top). It seems too clear to require argument that at the time he was injured petitioner was making no use of the running board as such and that the Safety Appliance Acts do not require secure running boards so that end handholds may be affixed thereto, but only to stand and walk on. Therefore, respondent will not further argue with respect to this alleged violation.

Both the trial and appellate courts found that when petitioner was injured he was using the handhold in question for a purpose for which it was not intended or required by the Safety Appliance Acts (R. 66, 67, 124). In his Petition and Brief petitioner argues that notwithstanding such fact, he comes within the class entitled to the protection of the Safety Appliance Acts relating to handholds and is entitled to recover solely because he was injured by reason of a defective hand-

hold while engaged in the performance of his duties as a brakeman. Therefore, unless the decision of the court below, (1), is in conflict with the decision of some other Circuit Court of Appeals on the same matter; or (2) is in conflict with the applicable decisions of this court or (3) the question involved has not already been settled by the applicable decisions of this court, there are no special or important reasons why this court, in the exercise of a sound judicial discretion, should review the judgment of the lower court.

SUMMARY OF ARGUMENT.

I. Decision of court below not in conflict with the decision of any other Circuit Court of Appeals on the same matter.

II. Decision of court below not in conflict with applicable decisions of this court.

III. The question involved already settled by the applicable decisions of this court.

ARGUMENT.

I.

DECISION OF COURT BELOW NOT IN CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT COURT OF APPEALS ON THE SAME MATTER.

Petitioner cites *Lehigh Valley R. Co. v. Howell,* 6 Federal (2d) 784 (C. C. A. 2), and *Chesapeake and O. Ry. Co. v. Smith,* 42 Federal (2d) 111, (C. C. A. 6), and claims that they are in conflict with the decision in the instant case.

Howell was injured while in the act of stepping from one of the rungs of the end ladder on a freight car to the brake platform preparatory to releasing the handbrake thereon. As he placed his hand on the brake wheel to pull on it to release the brake he incidentally used it as a support to assist him in completing his climb to the brake platform, and as he did so the ratchet rose up over the pawl, causing the brake to unwind and injuring Howell. The brake was defective for its intended use and Howell sued as for a violation of the Safety Appliance Acts requiring efficient handbrakes. The railway company contended that because Howell was not actually pulling on the brake wheel at the time it rose up and caused his injury but was using it as a handhold, he was using the brake for a purpose for which it was not intended or required by the Safety Appliance Acts and, therefore, could not recover as for a violation thereof. The Circuit Court of Appeals, while recognizing that if he had been using it primarily and solely as a handhold he might not be entitled to recover as for a violation of the Acts relating to handbrakes, held that in fact at the time he was injured he was proceeding to release the brake and had hold of the brake wheel to pull on it for that express purpose,

and that merely making an incidental use of it as a support in climbing to the brake platform did not preclude recovery as for a violation of the handbrake statute. In the case at bar Swinson was not using the handhold either primarily or incidentally for its intended purpose, but solely as a foot brace to secure leverage to exert pressure in releasing the brake. There is no conflict between the lower court's decision herein and that in the *Howell* case.

In the *Smith case* the employe involved was riding in the caboose of a train and was injured because of an unexpected and abrupt reduction in speed due to defective air brakes. He sued as for a violation of the Safety Appliance Acts requiring automatic air brakes on trains so that the locomotive engineer could "control its speed without requiring brakemen to use the common handbrake for that purpose". The railway company contended that because such unexpected setting of the air brakes did not require the brakemen on this train to use the common handbrake to control the train's speed, Smith could not recover as for a violation of the air brake provisions. Manifestly, Smith was injured as the direct result of the failure of the air brakes to function when used for their intended purpose, that is, to control the speed and stopping of the train so as to prevent injury to employes and passengers. Petitioner in the case at bar was not only not using the handhold for its intended purpose, but was wilfully *misusing* it, the natural tendency of such misuse being to make defective a handhold otherwise safe and secure for its intended use. Therefore the decision in the *Smith* case is not in conflict with the decision of the court below.

It will be seen that the decision of the court below is not in conflict with that of any other Circuit Court of Appeals.

II.

DECISION OF COURT BELOW NOT IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

At Page 26 of his Brief, petitioner states: "While the general principles have been heretofore determined by this court, and *contrary* to the decision of the Circuit Court, the precise question has not been passed upon." This is incorrect, as the applicable principles *have* been determined by this court, but as will be later shown, the decision of the Court below is not contrary to those principles. This court has frequently held that where it has laid down controlling principles it will not review on certiorari, simply because the facts in a given case happen to differ from those involved in the decisions laying down the controlling principles. Such is the situation here.

Petitioner contends that the decision of the court below is in conflict with the decisions of this court in *Louisville & Nashville R. R. Co. v. Layton,* 243 U. S. 617; *Minneapolis & St. Louis R. R. Co. v. Gotschall,* 244 U. S. 66; *Davis v. Wolfe,* 263 U. S. 239, and *Fairport P. & E. R. Co. v. Meredith,* ... U. S. ...., 54 S. C. R. 826.

The *Layton* case was decided April 30, 1917. The sole question therein was whether an employe, injured by the failure of the couplers on two cars to couple automatically on impact, was precluded from recovering as for a violation of the Safety Appliance Acts relating to couplers, because at the time he was not between the ends of the two cars engaged in the coupling operation, and consequently was not one of those for whose benefit that Safety Appliance Act was passed. This court held that while one of the purposes of the Safety Appliance Acts relating to couplers was to obviate the necessity of men going between the ends of cars to couple and uncouple, it

was also the purpose of the Act to require couplers that would couple automatically by impact. Layton *was* injured as the direct result of the failure of the two cars to couple automatically on impact. This court in the *Layton* case was urged to deny recovery on the claim that in its previous decision in *St. L. & San Francisco R. R. v. Conarty,* 238 U. S. 243, it had held that recovery under the Act would be denied unless the employe when injured by a defective coupler was between the ends of cars engaged in a coupling operation. This court refused to so construe its decision in the *Conarty* case. The language of this court in the *Layton* case to the effect that the test of recovery was whether the failure to obey the Safety Appliance laws was the proximate cause of injury to an employe in discharge of his duty and "not from the position the employe may be in or the work which he may be doing at the moment when he is injured" (243 U. S. 621), must be considered in relation to the facts in that case, and is not entitled to the broad construction contended for by petitioner. When the court in that case referred to the "position" of, and the "work" the employe was doing, it meant that if the failure of the coupler to function for its intended purpose was the proximate cause of his injuries, and he was then in the discharge of his duty and, therefore, an employe of the carrier within the purview of the Federal Employers' Liability Act, he could recover even though at the time not between the ends of cars engaged in a coupling operation. In the *Layton* case the couplers involved were being used for their intended purpose to couple automatically on impact and, therefore, Layton was within the class entitled to the benefit of the Safety Appliance Acts relating to couplers and his injury was a proximate result of the violation of those acts. Had the court intended any other construction to be placed upon its opinion in the *Layton*

case, it would have therein overruled its decision in the *Conarty* case, which it did not do, because in the *Conarty* case recovery was denied because Conarty was not within the class entitled to the benefit of the Acts, for the reason that he was attempting to utilize the coupler on the defective car to provide a space between cars, which this court held was not the purpose for which it was required or intended by the Act. There is no conflict between the decision in the *Layton* case and that in the instant case.

The *Gotschall* case was decided May 21, 1917. Gotschall, while riding in a car in a train that separated because the coupling apparatus failed to function properly, was injured as the direct result thereof. So far as material here, the question in that case was whether the mere separation of the couplers was proof of a violation of the Safety Appliance Acts relating to couplers. This court held that it was. The purpose of the Act was to require couplers that would not only couple and uncouple automatically, but would remain coupled. Gotschall was injured as the direct result of the failure of these couplers to perform this intended function. Whether Gotschall was within the class entitled to the protection of the Acts because at the time he was not between the ends of cars engaged in a coupling operation, was not discussed by this court, nor was the *Layton* or *Conarty* case referred to in its opinion. Admittedly, in the instant case, if Swinson had been using the handhold for the purpose for which handholds were required and intended by the Safety Appliance Acts, the giving way of it would be evidence of a violation of the Acts and he would be within the class entitled to protection thereunder. There is no conflict between the decision in the instant case and that in the *Gotschall* case.

The *Wolfe* case (referred to in petitioner's brief as the *Davis* case) was decided November 12, 1923. The question therein was whether Wolfe, admittedly injured because of a defective handhold while using it as such, should be denied relief as for a violation of the Safety Appliance Acts relating to handholds because at the time he was not engaged in a coupling operation. This court held the mere fact that the Safety Appliance Acts relating to couplers was the statute involved in the *Layton* case, did not prevent the principles enunciated in the *Layton* decision being applicable in the *Wolfe* case, and that while one of the purposes of the Safety Appliance Acts relating to handholds was to give greater security to men in coupling and uncoupling cars, handholds were also required for the security of employes in other than coupling operations, and because Wolfe was not engaged in a coupling operation did not prevent his recovering as for a violation of the Acts relating to handholds. It is significant that when Wolfe was injured he *was* using the handhold as a handhold for its intended purpose and not as a brace for his foot so that he could exert foot pressure thereon to secure leverage in performing some other operation. This court's language in the *Wolfe* case, (which petitioner claims authorizes recovery by him herein as for a violation of the Safety Appliance Acts, although using the appliance for a purpose for which it was not intended or required by the acts), must be considered in relation to the facts in that case. When this court said: "He can recover if the failure to comply with the requirements of the Acts is a proximate cause of the accident, resulting in injury to him while in the discharge of his duty, although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection" (263 U. S. 243), it did not mean that an employe using an appliance for a purpose not intended or required by the Act could

recover thereunder. An employe must be in the discharge of duty to be an "employe" under the Federal Employers' Liability Act, and when this court referred to an "operation" it meant that it was unnecessary that the employe be engaged in a "*coupling operation*," and no more. This is evident because while in the *Wolfe* case it distinguished its previous decisions in the *Conarty* case and in *Lang v. N. Y. Central R. R.*, 255 U. S. 455, it reaffirmed and did not overrule the doctrine it had enunciated in those cases, and in referring to the decisions in those cases stated: "The requirement of automatic couplers not being intended to provide a place of safety between cars brought into collision through other causes" (263 U. S. 242). In other words, the couplers involved in the *Lang* and *Conarty* cases were not being used to couple or uncouple, but to provide a space between cars, which this court held was not their intended or required purpose under the Act. There is no conflict between the *Wolfe* decision and the decisions in the *Conarty* and *Lang* cases, or between the *Wolfe* decision and that in the instant case.

In the *Meredith* case the respondent was struck at a highway crossing due to the failure of the automatic air brakes on a train to be properly connected and functioning. The railway company contended that respondent, being a traveler at a highway crossing, was not entitled to protection under the Federal Safety Appliance Acts relating to automatic air train brakes because the title of the Acts stated that they were for the protection of employes and passengers on railroad trains. This court held that while the Acts were for the protection of passengers and employes on railroad trains, automatic air train brakes were required to permit the engineer, from the locomotive, to control the speed and to stop the train should occasion

require for the protection of a traveler at a highway crossing, and that such traveler needed such protection as much as an employe or passenger. This court in the Meredith decision, its last expression on the subject, was careful to state that only those persons falling within the terms and intent of the Safety Appliance Acts could recover as for a violation thereof. To support its conclusion therein it cited the *Layton, Wolfe, Conarty* and *Lang* cases under the assumption that all of them were consistent. Respondent in the *Meredith* case was injured as a direct result of the failure of the air brakes to function for their intended purpose. Manifestly, if while groping for the air hose to place her foot thereon in climbing between cars respondent therein had been injured because the hose was disconnected, she would not have been entitled to the protection of the Acts relating to air brakes, because under those circumstances she would be using, or claiming the right to use, the air brake apparatus for a purpose for which it was not intended or required by the Acts. Swinson, the petitioner here, was not attempting to utilize the handhold for its intended or required purpose, that is, as a handhold and for that reason he was not within the class entitled to the protection of the Safety Appliance Acts and the violation thereof as to him was not the proximate cause of his injuries. There is no conflict on principle between the decision in the *Meredith* case and that in the instant case.

Petitioner cites *McNaney v. Chicago, Rock Island & Pacific RR. Co.*, 132 Minn. 391, 157 N. W. 650; *Clapper v. Dickinson*, 137 Minn. 415; 163 N. W. 752 and *Frye v. C. R. I. & P. RR. Co.*, 157 Minn. 52; 195 N. W. 629. While these are decisions of State Courts and not controlling here, respondent will briefly discuss them. The railway company's contention in the *McNaney* case was almost identical with that of the carrier in-

volved in the *Wolfe* case. What has heretofore been said with reference to the *Wolfe* decision is equally applicable to the decision in the *McNaney* case. The decision in the *Clapper* case was based almost entirely on that of this court in the *Layton* case, and what has been said herein with reference to the *Layton* decision applies equally to that in the *Clapper* case. In the *Frye* case there was involved an entirely different Safety Appliance Statute, (Boiler Inspection Act) which required that every locomotive, boiler, tender and all parts and appurtenances thereof be in proper condition and safe to operate *in the service to which the same were put* so that they might be employed in the actual service of the carrier without unnecessary peril to life or limb. The Minnesota Supreme Court held that the appliance involved was defective in the service to which the carrier had put it, and Frye, having been injured because of such defect, was one for whose benefit the provision of the Boiler Inspection Act relied on was passed. The *Frye* case is not in point here, and considered in relation to the facts there involved, is not even indirectly in conflict with the decision in the instant case.

III.

THE QUESTION INVOLVED ALREADY SETTLED BY THE APPLICABLE DECISIONS OF THIS COURT.

There are four decisions of this court which, on principle, are controlling. *St. L. & San Francisco RR. Co. v. Conarty*, 238 U. S. 243; *Lang v. New York Cent. RR. Co.*, 255 U. S. 455; *Chesapeake & Ohio Ry. Co. v. Nixon*, 271 U. S. 218; *Chesapeake & Ohio Ry. Co. v. Mihas*, 280 U. S. 102. The *Lang* and *Conarty* cases involved alleged violations of Safety Appliance Acts. The *Nixon* and *Mihas* cases did not, but the principles therein

stated are applicable here. The Safety Appliance Acts merely changed the common law duty to exercise ordinary care to furnish safe appliances to an absolute duty to do so, but did not alter the rule that such duty was owing only to those for whose protection it was laid down.

The *Conarty* case was decided June 14, 1915. Conarty, while riding the front footboard of a switch engine, was injured in a collision between it and a box car from which the coupling apparatus was missing. Had the coupler knuckle and draw bar on the box car been intact, sufficient space would have remained between the engine and car to have prevented Conarty's injury. Conarty sued to recover as for a violation of the Safety Appliance Acts relating to couplers. He was a switchman and, therefore, according to petitioner's contention in the instant case, was within the class entitled to the protection of the Acts. Notwithstanding, this court held that he could not recover because the Safety Appliance Acts did not require couplers for the purpose of providing a safe place for employes between cars and that couplers were required solely for the purpose of permitting cars to couple and uncouple automatically and remain coupled. Neither Conarty nor any member of his crew intended to couple the engine to the defective car and, therefore, at the time they were not using the coupling apparatus for the purpose for which it was intended and required by the Act. For that reason, even though the coupler was defective and Conarty was a switchman engaged in the performance of his duties, this court held that he was not within the class entitled to the protection of the Act and that the absence of the coupling apparatus on the defective car, under those circumstances, did not operate as a breach of any duty imposed by the statute for his benefit, and, in line with

the opinion of the Circuit Court of Appeals herein, that the violation of the Acts was not as to him a proximate cause of his injury. If Conarty, or any member of his crew, had intended to couple the engine to the defective car, under the doctrine of the *Layton* and *Wolfe* cases, he would have been entitled to recover because in such case the coupling apparatus would be used for the purpose for which it was intended and required by the Act, to-wit, to couple automatically on impact. The *Conarty* decision was considered by this court in the *Layton* case and held inapplicable to the facts therein because Layton's injury resulted from the failure of the coupler to perform its intended purpose and, consequently, Layton was within the class entitled to the benefit of the Acts and his injury was the proximate result of their violation. On the other hand, in the *Conarty* case, the employe involved claimed the right under the Acts to use the coupler to provide for him a place of safety between cars, "the requirement of automatic couplers not being intended to provide a place of safety between cars brought into collision through other causes" (263 U. S. 242). Therefore, this court held that he was not within the class entitled to the protection of the Acts and because the railway company was not required to anticipate that he would attempt to use it for such purpose, his injury was not the proximate result of the violation of the Acts. The *Conarty* decision settled the question here involved and the rule therein announced is applicable to this case.

The *Lang* case was decided March 28, 1921. The employe there claimed the right under the Safety Appliance Acts to use the coupling apparatus to provide a space between cars, as in the *Conarty* case. This court's attention was directed to the language it had used in the *Layton* opinion, which, it was claimed, was authority for the proposition that once it appears

that a safety appliance is defective and that the employe is injured in line of duty because of such defect, he can recover regardless of the position he occupies or the operation in which he is engaged at the moment. It was further argued that Lang, being a brakeman injured in line of duty as the result of a defective coupler, was within the class entitled to the protection of the Acts relating to couplers, and that all this court had decided in the *Conarty* case was that Conarty could not recover because when injured he was not between cars engaged in a coupling operation, or, stated otherwise, that this court in the *Layton* case intended to overrule the *Conarty* decision. This court rejected that construction of its decision in the *Layton* case and, after calling attention to the imperative requirement of the Safety Appliance Acts making it mandatory to provide couplers which would couple and uncouple automatically on impact, stated that even after a defect is established, the inquiry then necessarily is, to what situation and when and to what employe does the Act apply, and held that the principles it had announced in the *Conarty* case were applicable to *Lang's* situation. The decision in the *Lang* case considered in relation to that in the *Conarty* case and the treatment of the *Lang* and *Conarty* decisions by this court in the *Layton* and *Wolfe* opinions, clearly shows that this court did not intend to hold in either the *Layton* or *Wolfe* cases that an employe, when using or claiming the right to use a safety appliance for a purpose for which it is not intended or required by the Safety Appliance Acts, can recover merely because a defect causes an injury while he is engaged in performance of his duties as either brakeman or switchman. In the *Lang* case it was contended that the language in the *Layton* decision, on which petitioner herein relies, entitled Lang to recover under the Safety Appliance Acts. This court rejected such con-

tention and held the *Conarty* decision controlling. In doing so it made clear the basis of its decision in the *Conarty* case. Conarty was denied recovery because he claimed the right to use the coupling apparatus on the defective car to provide him a place of safety between it and the engine, or for a purpose for which couplers were not intended or required by the Safety Appliance Acts. Therefore, the absence of the coupler and drawbar on the car was not a breach of any duty imposed for Conarty's benefit under the safety appliance acts, because in that situation he was not one for whose benefit the Acts were passed and the violation of the Acts due to the defect in the coupling apparatus was not the proximate cause of his injury. We are here using the term "proximate cause" in the legal sense in which this court used that term in the *Conarty*, *Layton*, *Lang* and *Wolfe* decisions and are considering whether the violation of the Acts was the proximate cause and not whether the defective coupler, as a physical object, caused the injury. The Safety Appliance Acts impose a duty for the benefit of certain persons in certain situations and it is only when the violation of this duty to those persons in those situations causes them injury that the violation can be said to be the proximate cause thereof.

In the *Nixon* case the employe was injured by reason of being run down by a train while on a track car enroute to his work, due to the failure of an engine crew to keep a proper lookout ahead for him. Had such lookout been kept, he would not have been injured. However, the duty to keep the lookout was not for Nixon's benefit but for that of the public at highway crossings. This court, in effect, held that while a duty owing to the public was violated and the breach of such duty injured Nixon, he could not recover because no duty owed him had been breached. In the instant case Swinson was injured as a

result of respondent's alleged violation of a duty owing only to one using the handhold for its intended purpose. As did this court in the *Nixon* case, the court below denied recovery herein because it did not appear that respondent had violated any duty owing Swinson under the Safety Appliance Acts. The mere fact that respondent under the Acts would be liable to an employe using the handhold for its intended purpose did not make respondent liable to Swinson, nor was his injury one which it was required to anticipate as the result of a violation of a duty it owed another employe using the handhold for the purpose for which it was intended and required by the Acts.

In the *Mihas* case the employe, a switch light tender, was injured while attempting to climb over a coal car standing with a number of others on a switch track when they were suddenly and without warning moved by the railway company's employes. There was evidence that it was customary for trainmen before moving cars to personally notify persons engaged in unloading the same. Such notice, however, was exclusively for men so engaged. Following its decision in the *Nixon* case, and citing *O'Donnell v. Providence & W. R. R. Co.*, 6 R. I. 211, this court held that because the breach was of a duty owed someone else, Mihas could not recover, and, in effect, that the carrier was not required to anticipate that the violation of such duty would cause injury to Mihas.

CONCLUSION.

It will be seen (a) that the decision of the court below is not in conflict with the decisions of the Circuit Courts of Appeals, (b) that the applicable decisions of this court are the *Conarty, Lang, Nixon* and *Mihas* cases, and that the decision of the court below is not in conflict with them; and (c) that

the decision of the court below is in accord with the controlling applicable principles settled and laid down by this court in the *Conarty, Lang, Nixon* and *Mihas* decisions, and since there are no special or important reasons requiring this court to review the decision of the court below, no useful purpose will be served by granting the writ herein prayed for, and that the petition should be denied.

Respectfully submitted,

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